Supreme Court, U.S.
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No. 6, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The State of Nebraska seeks leave to file a petition for an order enforcing this Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which establishes an interstate apportionment of the flow of the North Platte River.[1] The United States, a party to the original action, suggests that this Court grant leave to file the petition and refer the matter to a Court-appointed Special Master for further consideration.

1. In 1934, the State of Nebraska sought leave to file an original action in this Court to resolve a dispute with the State of Wyoming over the use of the water of the North Platte River. *Nebraska* v. *Wyoming*, No. 6, Orig. (filed Oct. 8, 1934). This Court granted Nebraska leave to file the complaint (293 U.S. 523 (1934)), denied Wyoming's motion to dismiss (295 U.S. 40 (1935)), and appointed a Special Master (296 U.S. 542 (1935)). The State of Colorado was impleaded as a defendant (296 U.S. 553 (1935)) and the United States was granted leave to intervene (304 U.S. 545 (1938)).

[1] The decree is set forth at 325 U.S. at 665-672.

Six years later, after lengthy hearings, the Special Master submitted his report. This Court heard argument on exceptions to the report and, on June 11, 1945, issued an opinion providing for equitable apportionment of the natural flow of the North Platte River among the three States (325 U.S. 589). The Court entered a decree on October 8, 1945, that specified each State's obligations (*id.* at 665-672). The decree expressly provided that the Court would retain jurisdiction of the suit and that "[a]ny of the parties may apply at the foot of this decree for its amendment [and] further relief" (*id.* at 671). This Court later modified and supplemented the decree upon joint request of the parties (345 U.S. 981 (1953)).

2. Nebraska contends that "[t]he State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Decree" (Neb. Pet. 2). Nebraska cites four bases for this allegation. It claims that Wyoming threatens the flow of the North Platte River by (a) the operation of the Greyrocks Reservoir on the Laramie River; (b) the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte rivers; and (c) the proposed construction of storage capacity on certain tributaries entering the North Platte River (*ibid.*). Nebraska also claims that Wyoming officials have attempted "to prevent the United States' Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes of Nebraska for the benefit of water users in the State of Nebraska" (*ibid.*).[2]

[2] The United States, at present, has only limited familiarity with Nebraska's first three bases for relief. However, the fourth basis apparently relates to a suit by the State of Wyoming, filed on October 3, 1986, in Wyoming state court, against the United States, the Secretary of the Interior, and numerous officials of the Bureau of Reclamation. *State of Wyoming, ex. rel. George L. Christopulos, Wyoming State Engineer* v. *United States of America, et al.*, No. 23-13 (8th Judicial District, Goshen Co., Wyo.). The complaint (reproduced as an addendum to this memorandum), asserts that the United States, in operating the Bureau of Reclamation's North Platte Project, has failed to comply with Wyoming law in diverting water from the North Platte River through the Interstate Canal for storage in Nebraska's Inland Lakes. See Addendum, *infra*, 6a-7a. The United States has removed this action to federal court and its answer is presently due on January 31, 1987. Nebraska may be an indispensable party to the dispute.

3. This Court stated in *Nebraska* v. *Wyoming, supra*, that the longstanding dispute over the use of the North Platte River presents a "clash of interests * * * of that character and dignity which makes the controversy a justiciable one under our original jurisdiction" (325 U.S. at 610). The Court recognized that "[t]he matter is a delicate one and extremely complex" (*id.* at 617). It drafted the decree to resolve the immediate controversy and to provide sufficient flexibility to address future circumstances, stating (*id.* at 620):

> But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions.

See also *id.* at 622-623 ("If conditions of supply substantially change, any party can apply for modification of the decree."). The Court expressly retained jurisdiction to provide appropriate relief, fully anticipating that future disputes might arise (*id.* at 655, 671-672; 345 U.S. at 981).

Nebraska's petition – objecting to Wyoming's operation of present works, construction of future works, and challenges to Bureau of Reclamation activities (Pet. 2) – appears to identify a substantial interstate dispute that threatens to "disturb the delicate balance of the river" (325 U.S. at 625). Furthermore, the dispute appears to fall

within this Court's retained jurisdiction under the decree.[3] We therefore suggest that the Court grant Nebraska's motion for leave to file its petition and that it appoint a Special Master to examine the matters raised by Nebraska, as well as any other related issues properly raised by Wyoming, Colorado, or the United States.

Respectfully submitted.

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DECEMBER 1986

[3] This Court observed in fashioning the decree that the creation of future additional tributary storage between the Pathfinder and Guernsey reservoirs could require "an appropriate restriction" (325 U.S. at 625; see also *id.* at 671-672). And the Court repeatedly observed that the North Platte Project, including the preexisting Inland Lake reservoirs (Lake Alice and Lake Minatare), are entitled to water under the decree (see *id.* at 624-625, 633, 639-640, 646-647, 649 & n.2).

ADDENDUM

IN THE DISTRICT COURT OF
THE EIGHTH JUDICIAL DISTRICT
IN AND FOR GOSHEN COUNTY, WYOMING

Docket No. 23-13

STATE OF WYOMING, EX REL., GEORGE L. CHRISTOPOLUS, WYOMING STATE ENGINEER, PLAINTIFF,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, AND DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM MCCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS.

[Filed Oct. 3 1986]

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A. G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended. 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended. 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as

the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§ 372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying

with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are not diverting, and intend to continue diverting the natural flow of the North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendant's accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no right to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants, their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

/s/ A. G. McClintock

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Attorney General

/s/ Jennifer Hager

Jennifer Hager
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/s/ DENNIS C. COOK
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PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

/s/ GEORGE L. CHRISTOPULOS
George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

/s/ FRANCIS A. CARR
Notary Public

My Commission expires: March 14, 1987.

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